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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1979

No. 79-1612

AMERICAN BROADCASTING COMPANIES, INC., et al.,
Petitioners,
vs.
WESTERN INSTITUTE OF RETAILING, INC.,
VEGOD CORPORATION,
Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

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SUBJECT INDEX

Page

I

Statement of the case 1

II

The Supreme Court of California did not err in holding that respondents are not required to prove actual malice 3

1. The finding that respondents were not public figures is in accord with recent decisions of the United States Supreme Court 3
2. There is no rule in law or reason compelling a distinction between corporations and natural persons on the "public figure" issue 10
3. Petitioners were not denied due process of law under the Fourteenth Amendment 11

III

Conclusion 12

TABLE OF AUTHORITIES CITED

Page

Cases

Curtis Publishing Co. v. Butts, 388 U.S. 130, 87 S.Ct. 1975, 18 L.Ed.2d 1094 (1967) 3

Di Giorgio Fruit Corp. v. American Federation of Labor, 215 Cal.App.2d 560, 30 Cal.Rptr. 350 (1963).... 10

Gertz v. Robert Welch, Inc., 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974) 4, 9, 12

Hutchinson v. Proxmire, 443 U.S. 111, 99 S.Ct. 2675, 61 L.Ed.2d 411 (1979) 5, 6, 7, 8, 9

Martin Marietta Corp. v. Evening Star Newspaper Co., 417 F.Supp. 947 (D.D.C. 1976) 10

New York Times Co. v. Sullivan, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964) 2, 11

Time, Inc. v. Firestone, 424 U.S. 448, 96 S.Ct. 958, 47 L.Ed.2d 154 (1976) 4, 5

Trans World Accounts, Inc. v. Associated Press, 425 F.Supp. 814 (N.D.Cal. 1977) 11

Wolston v. Readers Digest Assn., Inc., 443 U.S. 157, 99 S.Ct. 2701, 61 L.Ed.2d 450 (1979) 5, 6

Constitution

United States Constitution, Fourteenth Amendment 11

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I

STATEMENT OF THE CASE

Plaintiffs and respondents Vegod Corporation (hereinafter "Vegod") and Western Institute of Retailing, Inc., (hereinafter "W.I.R.") commenced an action for defamation against defendants and petitioners American Broadcasting Companies, Inc., American Broadcasting Company KGO-TV Channel 7, Better Business Bureau of San Francisco and certain of petitioners' employees in the Superior Court for the City and County of San Francisco in October of 1972.

At pretrial conferences, the issue arose as to whether Vegod and W.I.R. were "public figures", and thus were required to prove by "clear and convincing evidence" that defendants had acted with "actual malice." The Superior Court found that plaintiffs were "public figures." Plaintiffs conceded that they could not prove "actual malice" within the requirement of *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964). Thereupon the Superior Court entered judgments in favor of the defendants.

Plaintiffs appealed to the Court of Appeal of the State of California, which affirmed the judgments. Plaintiffs thereupon petitioned for a hearing before the Supreme Court of the State of California. A hearing was granted, and that court reversed the judgments.

The courts below assumed certain facts in arriving at their opinions. Respondents objected to certain of these facts as not supported by the record, particularly those intended to describe the nature of the business relationship between respondents and the City of Paris department store. However, for the purposes of this responsive brief, respondents will assume the facts set forth in the Petition as true.

II

THE SUPREME COURT OF CALIFORNIA DID NOT ERR IN HOLDING THAT RESPONDENTS ARE NOT REQUIRED TO PROVE ACTUAL MALICE

1. The Finding that Respondents were Not Public Figures Is In Accord with Recent Decisions of the United States Supreme Court

As the California Supreme Court recognized in the first paragraph of its opinion, there is but one issue before the Court on this appeal: Are respondents "public figures", thus imposing upon them a duty in this defamation action of proving "actual malice" by clear and convincing evidence? (App., p. A-1).

The significance of this issue is the result of a series of decisions enunciated by the United States Supreme Court which have defined and refined the nature and scope of Constitutional privilege in defamation cases.

Since *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 87 S.Ct. 1975, 18 L.Ed.2d 1094 (1967), it has been clearly established that "public figures" are forbidden by the Constitution from recovering damages for defamation absent proof that the defendant acted with actual malice in publishing the defamatory material. "Public figures" were defined as persons who are

> intimately involved in the resolution of important public questions or, by reason of their time, shape events in areas of concern to society at large. 388 U.S. at 164, 87 S.Ct. 1996, 19 L.Ed.2d 1116 (Warren, C.J., concurring in result).

In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974), the United States Supreme Court reaffirmed the Constitutional significance of the "public figure" test and further defined that term. Justice Powell, speaking for the majority, stated:

> For the most part those who attain [the status of "public figure"] have assumed roles of especial prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved. 418 U.S. at 345, 94 S.Ct. 3009, 41 L.Ed.2d 808.

By contrast, a private individual is a person who has not "assumed an 'influential role in ordering society' (citation omitted)". *Ibid.*

Time, Inc. v. Firestone, 424 U.S. 448, 96 S.Ct. 958, 47 L.Ed.2d 154 (1976) further defined the term "public figure". That decision also clearly indicated that the term "public controversy" as used in *Gertz* is intended to have a meaning of its own. A public controversy is to be distinguished from matters of general or public interest.

> Petitioner contends that because the Firestone divorce was characterized by the Florida Supreme Court as a "cause celebre", it must have been a public controversy and respondent must be considered a public figure. But in so doing petitioner seeks to equate "public controversy" with all controversies of interest to the public. Were we to accept this reasoning, we would reinstate the doctrine advanced in the plurality opinion in *Rosenbloom v. Metromedia, Inc.* . . . , which concluded that

> the *New York Times* privilege should be extended to falsehoods defamatory of private persons whenever the statements concern matters of general or public interest. In *Gertz,* however, the Court repudiated this position . . . [citation omitted]. 424 U.S. at 454, 91 S.Ct. 965, 47 L.Ed.2d 163.

The recent cases of *Hutchinson v. Proxmire,* 443 U.S. 111, 99 S.Ct. 2675, 61 L.Ed.2d 411 (1979) and *Wolston v. Readers Digest Assn., Inc.,* 443 U.S. 157, 99 S.Ct. 2701, 61 L.Ed.2d 450 (1979) reaffirmed the "public figure" doctrine of *Gertz* and *Firestone* and provided further guidance in the application of that test. *Hutchinson* made it clear that an otherwise private person cannot be transformed into a public figure by the defamatory falsehoods themselves:

> To the extent the subject of [Hutchinson's] published writings became a matter of controversy it was a consequence of the [alleged defamatory statements]. Clearly those charged with defamation cannot, by their own conduct, create their own defense by making the claimant a public figure. [citation omitted] 443 U.S. at 135, 99 S.Ct. 2688, 61 L.Ed.2d 431.

Hutchinson also pointed out that one of the earmarks of a "public figure" is "regular and continuing access to the media." 443 U.S. at 135, 99 S.Ct. 2688, 61 L.Ed.2d 432.

In *Wolston v. Readers Digest Assn., Inc., supra,* Justice Rehnquist reiterated that the simple fact that the subject of a defamatory falsehood attracts media attention is not conclusive of the public figure issue.

> A private individual is not automatically transformed into a public figure just by becoming involved in or

> associated with a matter that attracts public attention. 443 U.S. at 167, 99 S.Ct. 2708, 61 L.Ed.2d 450.

The *Wolston* court also placed heavy emphasis on the characterization of a public figure as one who engages in purposeful activity to draw attention to himself in an effort to influence the resolution of public issues. *Ibid.*

Thus, the decisions of the United States Supreme Court on the "public figure" issue prescribe a method by which other courts may proceed to determine who does and who does not fall into that category. The threshold question asks whether the claimant is one of that small group of individuals who can be classified as public figures for all purposes. If not, then the court is to analyze the nature of the claimant's activities to determine whether he has "thrust himself or his views into public controversy to influence others." *Hutchinson v. Proxmire,* 443 U.S. at 135, 99 S.Ct. 2688, 61 L.Ed.2d 431. A necessary concomitant of this second level of inquiry is whether any "public controversy" exists at all.

In the case at bar, the Supreme Court of California faithfully followed the "public figure" test set down by the United States Supreme Court. Since neither party alleged that the respondents were public figures for all purposes, the opinion proceeded to determine whether respondents had thrown themselves into the vortex of a public controversy. The Court first analyzed the nature and extent of the respondents' involvement with the alleged public issue, the closing of a department store. The California Supreme Court concluded that, assuming *arguendo* that the closing of the store amounted to a public controversy,

the involvement of respondents with that issue was insufficient to support the claim that they had thrown themselves into the vortex of that public question.

> It does not appear that plaintiffs urged City of Paris publicly or otherwise to terminate business or to destroy the "landmark". Merely doing business with parties to a public controversy does not elevate one to public figure status. (App., p. A-7).

This reasoning of the California Supreme Court is in harmony with the United States Supreme Court's analysis in *Hutchinson v. Proxmire, supra.* In that case, Hutchinson had received a government grant to do certain research. Defendant Proxmire publicly characterized Hutchinson's work as worthless and a waste of public funds. In the subsequent suit for defamation, defendant claimed Hutchinson was a public figure based on Hutchinson's successful application for public funds and reports in the newspapers of these grants, and because he had access to the media as evidenced by the fact that his response to defendant's allegations were reported by wire services. The United States Supreme Court disagreed. Justice Rehnquist observed that Hutchinson's activities and public profile were much like countless others in his profession. He had not thrust himself into a public controversy to influence others. Concern about public expenditures is shared by many people. It was not sufficient to make Hutchinson a public figure.

> If it were, everyone who received or benefited from the myriad public grants for research could be classified as a public figure—a conclusion that our previous opinions have rejected. 443 U.S. at 135, 99 S.Ct. 2688, 61 L.Ed.2d 411.

The California Supreme Court recognized that if respondents in the case at bar were to be classified as public figures, then a host of private persons who maintained business or contractual dealings with the City of Paris store—employees, suppliers, wholesalers, etc.—would by logical extension also be public figures. The definition of "public figure" would then be reduced to meaninglessness.

The California Supreme Court then proceeded to determine whether a "public controversy" existed in the case at bar. It is undisputed that respondents were involved in the public sale of goods and merchandise. The Court analyzed whether the quality and availability of goods for sale in these circumstances was an issue that achieved the restrictive status of "public controversy". Justice Clark, writing for the majority, concluded in the negative. Criticism of commercial conduct, the Court stated, does not meet the "public controversy" standard necessary before the actual malice standard will be invoked.

> Balancing one individual's limited First Amendment interest against another's reputation interest (*Herbert v. Lando* (1979) 60 L.Ed.2d 115, 129), we conclude that a person in the business world advertising his wares does not necessarily become part of an existing public controversy. It follows those assuming the role of business practice critic do not acquire the First Amendment privilege to denigrate such entrepreneur. (App., p. A-8).

Once again, the case of *Hutchinson v. Proxmire, supra,* demonstrates the correctness of the California Supreme Court's analysis in the case at bar. In *Hutchinson,* the public question involved was the manner in which federal

government funds were being expended. The issue had been raised on the floor of the United States Senate. Surely this public question must be considered a matter of greater public concern than the quality of goods being sold at a department store. Yet the United States Supreme Court held that the issue in *Hutchinson*, while a matter of public concern, did not amount to a "public controversy" within the meaning of *Gertz* and its progeny. 443 U.S. at 135, 99 S.Ct. 2688, 61 L.Ed.2d 431. If the public issue in *Hutchinson* did not achieve that status, it is difficult to perceive how the sale of goods issue in the case at bar could be categorized as a "public controversy."

While the California Supreme Court did not so note in its decision, there is an additional rationale supporting its finding that respondents were not public figures. The record is barren of any evidence that there had been any public discussion whatsoever of the quality of respondents' goods prior to the allegedly defamatory broadcasts. Therefore, if this question ever did become a public issue, it became one solely as a result of the broadcasts themselves. A defendant cannot fashion for himself a privilege simply by widely disseminating the defamatory statements. *Hutchinson v. Proxmire*, 443 U.S. at 135, 99 S.Ct. 2688, 61 L.Ed.2d 431. Further, there is no evidence that respondents had available "regular and continuing access to the media", affording them an opportunity to respond to the defamatory broadcasts. *Ibid.*

2. There Is No Rule In Law or Reason Compelling a Distinction Between Corporations and Natural Persons on the "Public Figure" Issue

Petitioners urge that a different standard should be applied to corporate plaintiffs in defamation cases and that they should be required to prove actual malice even if they are not public figures. This argument was made to the California Supreme Court and persuasively rejected. Petitioners are able to cite but one authority seeming to propose such a distinction, *Martin Marietta Corp. v. Evening Star Newspaper Co.*, 417 F.Supp. 947 (D.D.C. 1976). No other reported case known to respondents has followed this anomolous holding, which must be regarded as dictum inasmuch as that court also held that the plaintiffs were public figures. 417 F.Supp. at 956. The California Supreme Court pointed out that in California a corporation's right and redress against defamation is well established (App., p. A-9). California law draws no distinction between the rights of natural persons and corporations in such actions. *Di Giorgio Fruit Corp. v. American Federation of Labor,* 215 Cal.App.2d 560, 570-571, 30 Cal.Rptr. 350, 355-356 (1963).

Moreover, there is no logical reason to draw such a distinction.

> While it is true that the Supreme Court's opinions in [defamation] cases have been cast in terms of protecting the rights of individuals, it is also true that the line between the interests of natural persons and corporations is frequently fuzzy and ill-defined. Various legal considerations have long led to the incorporation of businesses that are in economic reality but individual proprietorships or partnerships. On the

other hand, very large business enterprises may be conducted as individual proprietorships or partnerships. For that additional reason, it seems that for purposes of applying the First Amendment to defamation claims, the distinction between corporations and individuals is one without a difference. *Trans World Accounts, Inc. v. Associated Press*, 425 F.Supp. 814, 819 (N.D.Cal. 1977).

3. Petitioners were Not Denied Due Process of Law Under the Fourteenth Amendment

Petitioners argue that they were denied due process of law because the California Supreme Court did not consider whether the California Constitution requires an affirmance of the trial court's opinion. However, petitioners cite no case law which in any way demonstrates that the California Constitution does compel a finding that respondents in these circumstances must prove actual malice within the meaning of *New York Times v. Sullivan, supra.* By virtue of plaintiff's stipulation (App., pp. A-12-13), the question of the relevance of the California Constitution to the issues in this appeal was not brought before the California Supreme Court. (App., p. A-8). As petitioners admit, they argued for affirmance of the trial court opinion on California Constitutional grounds in the lower courts. The California Supreme Court, which must be presumed to be familiar with its state constitution, nevertheless reversed the trial court judgment.

III

CONCLUSION

The California Supreme Court faithfully adhered to the "public figure" test enunciated by the United States Supreme Court in *Gertz v. Robert Welch, Inc., supra*, and its progeny, in arriving at its opinion below. Its holding that respondents are not "public figures" is compelled by those decisions.

Respondents respectfully request that the Petition For A Writ of Certiorari be denied.

Dated: July 3, 1980

Respectfully submitted,

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(Appendix follows)

Appendix A

In the Supreme Court
of the
State of California

S.F. 23999
Super. Ct. 652-227

Vegod Corporation et al.,
Plaintiffs and Appellants,
vs.
American Broadcasting Companies, Inc., et al.,
Defendants and Respondents.

[Filed Nov. 29, 1979]

SEE DISSENTING OPINION

In this defamation action the trial court ruled that plaintiffs are "public figures" within the meaning of Gertz v. Robert Welch, Inc. (1974) 418 U.S. 323 and that actual malice is an essential element of plaintiffs' cause of action. Plaintiffs conceded they are unable to prove defendants acted with actual malice within the holding of New York Times v. Sullivan (1964) 376 U.S. 254. Judgment was granted defendants, and plaintiffs appeal. We reverse.

Plaintiff corporations are engaged in closing out stores that have failed or are going out of business. Plaintiffs arranged to conduct a "closing out sale" for the City of Paris, a respected San Francisco department store, opened in 1850 and described by the trial court as a "landmark

store." When the store's end appeared imminent in 1972, it was widely reported by the news media. Bargains were widely advertised. Plaintiffs also rented space to concessionaires who brought in outside merchandise according to their own practices and procedures.

A Better Business Bureau spokesman advised a KGO-TV news reporter that plaintiffs were selling inferior merchandise at inflated prices. KGO-TV notified plaintiffs of its intention to broadcast the story. One broadcast stated: "The City of Paris has always been a trusted San Francisco institution with a well-earned reputation for honesty a store can only get through many years of treating the public fairly but the Better Business Bureau has revealed exclusively to Newscene that it is not the trusted City of Paris management that's running the close-out campaign. The watchdog agency says two outside companies, Vega [*sic*] Corporation and Western Institute of Retailers [*sic*], have been brought in to handle the closeout, a closeout the Better Business Bureau says has deceived the public that trusts the name City of Paris and promises bargains that are not really bargains at all."

In New York Times v. Sullivan, *supra*, 376 U.S. 254, 269 et seq., the Supreme Court determined that public officials may not recover damages for defamation unless they show defendant acted with actual malice. While recognizing the First Amendment does not protect libelous statements, the court reasoned that erroneous statements are inevitable in free debate and must be protected if we are to maintain free discussion. Unless a privilege to err absent malice is recognized, grave danger exists that requiring publishers to guarantee accuracy will result in unreasonable

self-censorship. "[W]ould-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so." (376 U.S. at p. 279.) The court defined "actual malice" as making a statement "with knowledge that it was false or with reckless disregard of whether it was false or not." (376 U.S. at pp. 279-280.)

Three years later in Curtis Publishing Co. v. Butts (1967) 388 U.S. 130, 155, the court held that public figures —like public officials—must prove actual malice to recover for defamation. Although the court did not give us an encompassing definition of public figure, it held the plaintiffs in the two cases before it met the public figure test. In one, the plaintiff was an athletic director of a state university who was employed by a private corporation rather than the state. The libelous statement was a report covering an alleged conversation between him and a coach of another university and the ensuing football game between the two universities. Plaintiff in the second was a retired Army officer who had "thrust himself into the 'vortex' of the controversy" over admission of a black to a state university, and the libelous statement related to his conduct with respect to a riot at the university. (388 U.S. at pp. 140-142, 146.)

The Supreme Court again sought to strike a balance between vindication of honor through defamation law on one side and free speech and press protected by the First Amendment on the other in Gertz v. Robert Welch, Inc., *supra,* 418 U.S. 323. The court recognized that, while false statements of fact enjoy no constitutional protection, per-

mitting strict liability for false statement impairs First Amendment liberties by deterring speech that matters. The court also recognized the state has a legitimate interest in protecting reputation. The court defined public figures: "In some instances an individual may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts. More commonly, an individual voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues. In either case such persons assume special prominence in the resolution of public questions." (*Id.*, at p. 351.)

Distinguishing between private and public figure the court reasoned that public figures ordinarily will have significantly greater access to the media to contradict lie and error than will private individuals, and that those classed as public have voluntarily thrust themselves to the fore, inviting attention and comment and exposing themselves to increased risk of defamatory falsehood. Private persons by contrast have not undertaken an " 'influential role in ordering society.' " (418 U.S. at pp. 344-345.)

Gertz was an attorney employed to bring a wrongful death action by the family of a person killed by a police officer convicted of second degree murder. The alleged libelous article asserted that the conviction was a frameup, part of a Communist conspiracy, and it claimed that Gertz had Communist connections.

Recognizing that Gertz had been active in community and professional affairs, the court stated: "We would not lightly assume that a citizen's participation in community

and professional affairs rendered him a public figure for all purposes. Absent clear evidence of general fame or notoriety in the community, and pervasive involvement in the affairs of society, an individual should not be deemed a public personality for all aspects of his life. It is preferable to reduce the public-figure question to a more meaningful context by looking to the nature and extent of an individual's participation in the particular controversy giving rise to the defamation.

"In this context it is plain that petitioner was not a public figure. He played a minimum role at the coroner's inquest, and his participation related solely to his representation of a private client. He took no part in the criminal prosecution of Officer Nuccio. Moreover, he never discussed either the criminal or civil litigation with the press and was never quoted as having done so. He plainly did not thrust himself into the vortex of this public issue, nor did he engage the public's attention in an attempt to influence its outcome. We are persuaded that the trial court did not err in refusing to characterize petitioner as a public figure for the purpose of this litigation." (418 U.S. at p. 352.)

Although private persons are not necessarily required to prove actual malice to recover for defamation, states may not impose liability without fault. In such cases, the state may determine the fault standard to apply. (418 U.S. at p. 347.)

In Time Inc. v. Firestone (1976) 424 U.S. 448, the court again considered the meaning of the term "public figure." Time magazine erroneously reported that a divorce

was granted to Mr. Firestone on grounds of extreme cruelty and adultery. Time argued that Mrs. Firestone was a "public figure" since the 17-month trial attracted national attention, eliciting 88 articles in Miami and Palm Beach newspapers. Mrs. Firestone had also given several press conferences and was a prominent member of Palm Beach society.

Rejecting Time's argument the court stated: "[P]etitioner seeks to equate 'public controversy' with all controversies of interest to the public. Were we to accept this reasoning, we would reinstate the doctrine advanced in the plurality opinion in *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 91 S.Ct. 1811, 29 L.Ed.2d 296 (1971), which concluded that the *New York Times* privilege should be extended to falsehoods defamatory of private persons whenever the statements concern matters of general or public interest. In *Gertz,* however, the Court repudiated this position, stating that 'extension of the *New York Times* test proposed by the *Rosenbloom* plurality would abridge [a] legitimate state interest to a degree that we find unacceptable.' 418 U.S., at 346, 94 S.Ct., at 3010 [¶] Dissolution of a marriage through judicial proceedings is not the sort of 'public controversy' referred to in *Gertz,* even though the marital difficulties of extremely wealthy individuals may be of interest to some portion of the reading public. Nor did respondent freely choose to publicize issues as to the propriety of her married life. She was compelled to go to court by the State in order to obtain legal release from the bonds of matrimony. We have said that in such an instance '[r]esort to the judicial process . . . is no more voluntary in a realistic sense

than that of the defendant called upon to defend his interests in court." (*Boddie v. Connecticut,* 401 U.S. 371, 376-377, 91 S.Ct. 780, 785, 28 L.Ed.2d 113 (1971). Her actions, both in instituting the litigation and in its conduct were quite different from those of General Walker in *Curtis Publishing Co., supra.* She assumed no 'special prominence in the resolution of public questions.' *Gertz, supra,* 418 U.S., at 351, 94 S.Ct., at 3013. We hold respondent was not a 'public figure' for the purpose of determining the constitutional protection afforded petitioner's report of the factual and legal basis for her divorce." (424 U.S. at pp. 454-455; fn. omitted.)

Defendants argue that the demise and closing out sale of the City of Paris were matters of public controversy because it was a "landmark store." Even assuming the venerable store's planned destruction created a public controversy, those conducting the subsequent close-out sale cannot be said to have thrown themselves into the vortex of that controversy. It does not appear that plaintiffs urged City of Paris publicly or otherwise to terminate business or to destroy the "landmark." Merely doing business with parties to a public controversy does not elevate one to public figure status.

Defendants also urge that by selling goods to the public and by advertising the sale plaintiffs became public figures. In *Gertz* the court in concluding that he was not a public figure pointed out that Mr. Gertz had never discussed the civil or criminal litigation with the press. In *Firestone* the court pointed out that Mrs. Firestone did not seek publicity on the propriety of her marital conduct.

While availability of goods for sale and their quality are matters of public interest, this is not the test. The public interest test was expressly rejected in *Gertz* (418 U.S. at p. 346), and in *Firestone* (424 U.S. at pp. 455-456), in favor of the public controversy test. (See also Hutchinson v. Proxmire (1979) 47 U.S.L. Week 4827, 4833-4834.)

Criticism of commercial conduct does not deserve the special protection of the actual malice test. Balancing one individual's limited First Amendment interest against another's reputation interest (Herbert v. Lando (1979) 60 L.Ed.2d 115, 129), we conclude that a person in the business world advertising his wares does not necessarily become part of an existing public controversy. It follows those assuming the role of business practice critic do not acquire the First Amendment privilege to denigrate such entrepreneur.[1]

Pointing out that *Gertz* and *Firestone* relied on individual interests in reputation, one federal district court has held that in defamation actions corporations must prove malice in fact whenever the defamatory statement relates to a matter of public interest. (Martin Marietta Corp. v. Evening Star Newspaper (D.C. 1976) 417 F.2d 947, 954-956.) However, two other federal district courts have rejected the proposed distinction. (Reliance Insurance Co. v. Barron's (S.D.N.Y. 1977) 442 F.Supp. 1341, 1347-1348; Trans World Accounts, Inc. v. Associated Press (N.D. Cal. 1977) 425 F.Supp. 814, 819.)

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[1]Because plaintiffs' stipulation related to the First Amendment privilege under New York Times v. Sullivan, *supra*, 376 U.S. 254, we consider only that federal privilege and do not express any view as to whether the statements were priviliged under California law.

In California, a corporation's right and redress against defamation is well established. (DiGiorgio Fruit Corp. v. American Federation of Labor (1963) 215 Cal.App.2d 560; Daniels v. Sanitarium Assoc., Inc. (1963) 59 Cal.2d 602, 609; Hotel and Restaurant Employees Union v. Anaheim Operating, Inc. (1978) 82 Cal.App.3d 737, 752; Triton Insurance Underwriters, Inc. v. Mutual Chiropractic Insurance Co. (1965) 232 Cal.App.2d 829, 832; see also, Civ. Code, § 45; Rest.2d Torts, § 561.)

Rejecting the distinction between individuals and corporations in *Martin Marietta*, the court in Trans World Accounts, Inc. v. Associated Press, *supra*, 425 F. Supp. 814, 819, reasoned: "[A]t least in this case governed by California substantive law, there is no distinction between the protectible interest in reputation of corporations and individuals and the former as much as the latter may recover special, general and punitive damages. (*DiGiorgio Fruit Corp. v. American Federation of Labor*, 215 Cal. App.2d 560, 30 Cal.Rptr. 350, 355-356 (1963); compare Martin Marietta Corp. v. Evening Star, above, at 955. [¶] While it is true that the Supreme Court's opinions in these cases have been cast in terms of protecting the rights of individuals, it is also true that the line between the interests of natural persons and corporations is frequently fuzzy and ill-defined. Various legal considerations have long led to the incorporation of businesses that are in economic reality but individual proprietorships or partnerships. On the other hand, very large business enterprises may be conducted as individual proprietorships or partnerships. For that additional reason, it seems that for purposes of applying the First Amendment to defama-

tion claims, the distinction between corporations and individuals is one without a difference."

The judgment is reversed.

CLARK, J.

WE CONCUR:
TOBRINER, J.
MOSK, J.
RICHARDSON, J.
MANUEL, J.

Vegod v. American Broadcasting Companies, Inc.
S.F. 23999

DISSENTING OPINION BY NEWMAN, J.

Citing New York Times v. Sullivan, 376 U.S. at 269 et seq., the majority opinion concludes (*ante* p. 3): "[E]rroneous statements are inevitable in free debate and must be protected if we are to maintain free discussion. Unless a privilege to err absent malice is recognized, grave danger exists that requiring publishers to guarantee accuracy will result in unreasonable self-censorship."

The California Constitution ensures that those words apply here. Article I, § 2 commands that "[e]very person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right."

Was there an abuse of that right here? The majority so conclude, arguing (1) that the facts show no public controversy, and (2) that plaintiffs had not attained "public figure status". I disagree. I think it is clear that inner-city "close-out sales" in our era do inspire controversial concerns; and the "landmark" character of the building here merely helped to publicize those concerns and make them more newsworthy. Plaintiffs indeed did decide to thrust themselves into the vortex of that controversy, whether or not they already had become public figures.

NEWMAN, J.

I Concur:
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No. 652 227

In the Superior Court of the State of California,
In and for the City and County of San Francisco

Western Institute of Retailing, Inc., and Vegod Corporation,
Plaintiffs,

vs.

American Broadcasting Companies, Inc., et al.,
Defendants.

[Filed Mar. 10, 1977]

Stipulation Regarding Defendants' Motion for Summary Judgment

The plaintiffs in the above-entitled action stipulate as follows:

That the "Motion for Entry of Judgment for Defendants American Broadcasting Companies, Inc., KGO-TV Channel 7 and Christine Lund" filed with the above-entitled Court on February 25, 1977, may be heard by the Court on

March 10, 1977, as a Motion for Summary Judgment pursuant to California Code of Civil Procedure § 437(c); that any and all procedural or formal defects in said motion are hereby waived; and that defendants Better Business Bureau of San Francisco, Ltd., Charles Thurber, and Louis Keefer may join as moving parties in said motion.

That, following briefs and oral argument, the Court, on March 9, 1977, entered its ruling that plaintiffs Western Institute of Retailing, Inc. and Vegod Corporation are, as a matter of law, "public figures" within the meaning of *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), and that they must, therefore, prove by clear and convincing evidence "actual malice" as defined in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). That whereas said plaintiffs can at trial prove all the elements necessary for a verdict on their behalf under California state law, including "malice" within the meaning of California Civil Code § 47 (3), *Sanborn v. Chronicle Pub. Co.*, 18 C. 3d 406 (1976), and all other cases construing that statute if that privilege is found to be applicable to defendants, plaintiffs are unable to prove "actual malice" by "clear and convincing evidence" under *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), and *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967).

Dated: March 10, 1977

HOBERG, FINGER & BROWN

By: /s/ Peter N. Molligan
Peter N. Molligan
Attorneys for Plaintiffs